Supreme Court, U.S.
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CASE NO.

THE SUPREME COURT OF THE UNITED STATES
OCTOBER, 2002 TERM

Terry Wilkins,
Petitioner,

v.

Donald Jakeway, Vincent Lombardi, and Roberta Garber
Respondents,

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the decision of the Sixth Circuit Court of Appeals that held that state officials had qualified immunity for terminating an employee who complained to top management and the State Inspector General's Office that state employees were deliberately covering up the misuse of public funds is in conflict with this Court's recent decision in *Hope v. Pelzer*, _U.S.__122 S.Ct. 2508 (2002).

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CITATION TO OFFICIAL AND UNOFFICIAL REPORTS

The decision of the Court of Appeals, which petitioner is appealing, is unofficially reported at 2002 U.S. App. LEXIS 16711, 44 Fed. Appx 424.

STATEMENT OF JURISDICTION

The judgment which this petition seeks to have reviewed was entered by the Sixth Circuit Court of Appeals on August 15, 2002. Petitioner timely filed a Petition for Rehearing *En Banc* on August 29, 2002. The Court of Appeals denied the Petition For Rehearing *En Banc* on October 7, 2002.

This Court has jurisdiction to entertain this Petition pursuant to 28 U.S.C. §1254(1). The court of appeals' jurisdiction was based on 28 U.S.C. § 1291, and the district court had jurisdiction over this case under 28 U.S.C.§§1331 and 1343.

THE CONSTITUTIONAL PROVISION RELIED UPON

United States Constitution, First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

Petitioner Terry Wilkins was the Chief of the Office of Community Services of the Ohio Department of Development. His immediate supervisor was respondent Garber, who reported to Department Assistant Director respondent Lombardi, who reported to the Director of the Department of Development, respondent Jakeway.

Wilkins had responsibility for monitoring the use of public funds that were distributed by the Ohio Department of Development to local community action agencies. The audit office was responsible for auditing funds that were spent by community action agencies. Wilkins raised his concerns with superiors and the Ohio Inspector General that officials in the Department audit office were deliberately not addressing misuse of public funds by community action agencies and were covering up the misuse. See, *Wilkins v. Jakeway*, unreported, 2002 U.S.App. LEXIS 16711 (6th Cir. August 15, 2000), at *3-5 (App. 3a-4a).

Respondent Lombardi threatened Wilkins' job because Wilkins had talked with members of the staff of respondent Jakeway, the Director of the Ohio Department of Development about the misuse of public funds. The Ohio Inspector General issued a report that indicated that respondents Lombardi and Garber and the audit office were responsible for not uncovering the misuse of public funds by community action agencies. However, respondents Lombardi and Jakeway wanted to terminate Wilkins after the report came out, although the Ohio Inspector General believed that Wilkins was entirely blameless for the misuse of funds.

Wilkins was soon disciplined and then terminated from his position. Respondents had a number of explanations to try to justify terminating Wilkins, including alleging that Wilkins

repeatedly accused the audit office of wrongdoing. App. 5a. The Human Resource Director of the Ohio Department of Development believed that the discipline and termination were not justified and recommended against it. Plaintiff believed that he was disciplined and then terminated in retaliation for exercising his First Amendment right to address matters of public concern with his superiors and with the Ohio Inspector General.

Wilkins brought suit in the United States District Court for the Southern District of Ohio, Eastern Division, pursuant to 28 U.S.C. 1331 and 1343, claiming that his termination violated the First Amendment to the Constitution. Respondents filed a motion to dismiss petitioner's complaint, claiming that respondents were protected by qualified immunity. The district court denied the motion to dismiss, and a panel of the Sixth Circuit Court of Appeals affirmed the decision after respondents took an interlocutory appeal. The district court later granted respondents' motion for summary judgment. The Sixth Circuit Court of Appeals affirmed the summary judgment. The Court of Appeals denied petitioner's Petition for Rehearing En Banc.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

The writ should be granted, because the decision of the court of appeals is contrary to a recent decision of this Court, *Hope v. Pelzer*, ___U.S.___, 122 S.Ct. 2508.

This Court held in *Hope v. Pelzer* that state officials are entitled to qualified immunity for unconstitutional acts if "their actions did not violate 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Hope v. Pelzer, supra*, 122 S.Ct. at 2515, quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). This Court

went on to state that "(t)his is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful..." *Id.* This Court held in *Hope v. Pelzer,* citing *United States v. Lanier*, 520 U.S. 259 (1997) that "the salient question that the Court of Appeals ought to have asked is whether the state of the law (at the time of the conduct in question) gave respondents fair warning that their treatment of Hope was unconstitutional." *Id.*, 122 S.Ct. at 2516. "(G)eneral statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though 'the very action in question has (not)previously been held unlawful.'" *Id.*

The panel of the court of appeals in the case at bar did not apply the "fair warning" standard of *Hope v. Pelzer.* Instead, the court of appeals required that in order for state officials to be liable for unconstitutional acts there had to be previous decisions of the Sixth Circuit Court of Appeals that specifically stated that the exact conduct was unconstitutional. The court of appeals stated, quoting other Sixth Circuit decisions, that "(t)he right must be defined at the appropriate level of specificity to determine whether it was clearly established at the time the defendants acted....." "(C)ourts must: 'examine the asserted right at a relatively high level of specificity. The right must have been 'clearly established' not just in an abstract sense, but in a 'particularized' sense...." App. 10a, 11a. The Sixth Circuit's holding, if allowed to stand, would make it extremely difficult to prove that conduct of state officials is unconstitutional.

In the case at bar, Wilkins had told his superiors and the Ohio Inspector General that officials in the State of Ohio Department of Development audit office were deliberately not

addressing misuse of public funds by community action agencies and were covering up the misuse. The court of appeals indicated that the state officials were immune from a claim that disciplining Wilkins in retaliation for his speech violated the First Amendment, because he had not specifically charged "corruption or fraud" and because "most of Wilkins's speech assigned blame for the failures of the audit department and occurred during the performance of his job, where he was speaking as an employee and not as a citizen." App. 14a

However, the Sixth Circuit Court of Appeals had held in 1986 in an often cited case within the circuit that "(p)ublic interest is near its zenith when ensuring that public organizations are being operated in accordance with the law...and seeing that public funds are not purloined." *Marohnic v. Walker,* 800 F.2d 613 (6th Cir. 1986). The Court held in 1988 in a case involving the failure of a state agency to conduct audits of vendors that "it is possible to read the allegations that public monies are being spent unwisely and that a government program is being run inefficiently, as implying that a public agency or official is corrupt...(I)t is possible to read the allegations in the complaint as charging corruption in the agency, most notably on the part of McDowell (the Director of the State Bureau)....." *Barnes v.* McDowell, 848 F.2d 725, 734 (6th 1988), *cert. denied,* 488, U.S. 1007 (1989.[1]

Respondents in this case had fair warning that Wilkins' speech was protected by the First Amendment-he was telling his superiors and the Ohio Inspector General that a department of State was not being operated in accordance with the law

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[1]The court of appeals misstated its previous holding in *Barnes v. McDowell, supra.* The Court affirmed the summary judgment, because the plaintiff did not prove what he had alleged in his complaint. See, *id.*, at 734-735.

and that state officials were deliberately covering up the misuse by local agencies.

The Ohio Inspector General investigates only acts or omissions of state officials that are "not in accordance with the requirements of law or such standards of proper governmental conduct as are commonly accepted in the community and thereby subverts, or tends to subvert, the process of government." O.R.C. 121. 41 (g) and O.R.C. 121.42." Therefore, the fact that the Ohio Inspector General investigated Wilkins' complaint and concluded that Wilkins' allegations were correct had to be inherently a matter of public concern, as defined by previous decisions of the Sixth Circuit Court of Appeals.

Requiring Wilkins to state specifically that the audit officials were "corrupt" or committed "fraud" deviates substantially from the standard enunciated by this Court that a state official may be liable if "a general constitutional rule" was established that might apply to specific conduct. The Sixth Circuit had previously established the general constitutional rule that speech that state officials had not acted in accordance with the law and that money was spent unwisely was protected by the First Amendment. A lower court's statement that Wilkins had "assigned blame" to the audit office and that his speech "occurred during the performance of his job" would not remove the speech from First Amendment protection. All work-place speech, as the Sixth Circuit and this Court have held, involves the "assignment of blame" to other state employees and is done while the employee is performing his or her job. See, *Connick v.Myers*, 461 U.S.138 (1983); *Barnes v. McDowell, supra*; and *Mahronic v. Walker, supra.*

The court of appeals stated as an afterthought that Wilkins' speech was disruptive and that his interest in speech

was outweighed by the interest of the Government in efficiency. App. 14a. The use by the court of appeals of the balancing test set forth in this Court's decision in *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968) is a continuation of the court's deviation from the principles enunciated in *Hope v. Pelzer, supra.* The court of appeals in analyzing the balancing standard emphasized the testimony of respondents about the alleged disruption without considering whether the respondents had "fair warning" that the speech was protected.

A court's consideration of the balancing test in determining whether there is First Amendment protection diminishes the value of the First Amendment, as decision-makers can merely assert and present evidence that the speech is disruptive, and a court can conclude that the disruption outweighed the public's interest in the First Amendment. Whether an employee's speech is protected by the First Amendment will depend on a particular appellate court panel's view of how interests in the First Amendment should be balanced against government efficiency, rather than on any objective standard.

Speech that is effective is by its very nature disruptive on the Government. Government officials, particularly those who are implicated in covering up the misuse of public funds, consider employees who blow the whistle to be annoying and will spend time and resources to terminate the employee, such as the petitioner in this case.

Therefore, the question that must be answered is whether Government officials have fair warning that speech concerning the misuse of public funds is so important that it outweighs any disruption caused by the speech. At the time that petitioner was terminated, the Sixth Circuit Court of Appeals had emphasized the importance of the right to speak about Government misuse. For instance, the Court of Appeals

had stated that "(p)ublic interest is near its zenith when ensuring that public organizations are being operated in accordance with the law...and seeing that public funds are not purloined." *Marohnic v. Walker*, supra. Respondents certainly had fair warning that any disruption caused by petitioner's speech addressing the misuse of government funds would be outweighed by the importance of the speech.[2]

That the court of appeals issued an unpublished decision is no reason to deny the petition for writ of *certiorari*. The panel of the court of appeals may have tried to avoid review of the decision by the Sixth Circuit or this Court by denominating the decision unpublished. However, in these days of online access to decisions, the decision is readily available on Lexis, Westlaw and elsewhere and, unless *certiorari* is granted, will be used to undermine this Court's decision in *Hope v. Pelzer, supra.* Accordingly, there is no justification to refuse review to this case-which otherwise warrants review-because the panel marked the decision unpublished.

CONCLUSION

Therefore, petitioner requests that this Court grant his petition for Writ of Certiorari to the Sixth Circuit Court of Appeals and reverse its decision.

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[2]It is important to separate, as the court of appeals appears not to have done in this case, the alleged disruption caused by the speech and that caused by other conduct. The other conduct may be considered only in deciding whether the employee who was terminated for exercising his or her First Amendment rights would have been discharged for some legitimate reason. See, *Mt. Healthy City School Dist. Board of Education v. Doyle*, 429 U.S. 274 (1977). Whether there was a legitimate reason for the discharge is not an issue in this case.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
AUG. 15, 2002

Terry Wilkins,

Plaintiff-Appellant,

v.

Donald Jakeway, Vincent Lombardi, and Roberta Garber

Defendants-Appellees.

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. SIXTH CIRCUIT RULE 28(g) LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 28(g) BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

BEFORE: GUY and BATCHELDER, Circuit Judges; WALTER, District Judge. *

* The Honorable Donald E. Walter, United States District Judge, Western District of Louisiana, sitting by designation.

OPINION: ALICE M. BATCHELDER, Circuit Judge.

Plaintiff Terry J. Wilkins appeals the district court's order granting summary judgment to the defendants in this 42 U.S.C. §§ 1983 action for retaliatory discharge in violation of the First Amendment. Wilkins argues that the district court erred in failing to follow the law of the case doctrine and in determining that his speech was not protected by the First Amendment. Because we find that the defendants are entitled to qualified immunity we affirm.

I.

The extensive factual background of this case has been recounted in a number of orders in this and related actions. *See Wilkins v. Jakeway,* 183 F.3d 528, 533 (6th Cir. 1999); *Wilkins v. Jakeway,* 1996 U.S. App. LEXIS 5711, No. 94-4137, 1996 WL 84649 (6th Cir. Feb. 27, 1996) (unpublished). The facts material to this appeal appear in the district court's order from which this appeal is taken, and our review of the record persuades us that the district court's rendition is both accurate and complete. We therefore need only summarize the facts here.

The Office of Community Services (OCS), which is part of the Ohio Department of Development (ODOD), is the Ohio state agency charged with distributing money to local government agencies to assist the poor. Terry Wilkins was the Chief of the OCS until his employment was terminated in February of 1993.

Wilkins reported directly to Roberta Garber, the Deputy Director for the Community Development Division of the ODOD; Garber, in turn, reported to Vincent Lombardi, the Assistant Director of the ODOD, who answered to the ODOD's director, Donald Jakeway.

It was the responsibility of the ODOD's audit office to audit the agencies which received funds from the OCS. Beginning around 1990, Wilkins claims that as a result of independent audits, he became concerned with the inability of the ODOD audit office to determine whether the local government agencies were properly using the funds given them by the ODOD. Wilkins began to raise his concerns with his co-workers and superiors and, eventually, with the Ohio Inspector General. For example, Wilkins told Garber (and later the ODOD administration) that the on-site auditors from the audit office

> were coming to me sometimes in tears complaining that their senior auditors on-site would not allow them to document possible misuse of public funds .... I was also informed ... that they were later ridiculed by Melanie Buller [the head of the audit office], told that they found too much, that they had brought back too many questioned costs and that they were going to have to drop a lot of these items.

Wilkins claims that he was silenced by the defendants and told not to discuss any of his claims about the incompetence of the audit office.

Wilkins also sent memos to both the ODOD's chief

legal counsel, Tom Washbush, and Assistant Attorney General Alan Klodel, spelling out problems with the Lima-Allen County Community Action Committee ("LACAC"), a county agency that he regarded as grossly mismanaged. Wilkins repeated his earlier claims that the audit office was not uncovering evidence of gross misuse of funds.

Sometime around June of 1992, Jakeway became suspicious about the auditing and funding of the LACAC because previous audits had repeatedly shown that it was not operating properly and no one had stopped the ODOD from continuing to fund it. Since Jakeway was unsure of his ability to interpret correctly what the audits actually revealed, and because if he was correct it was possible that federal funds had been misused, Jakeway gave the audit documents to the Inspector General's office, who then suggested that his office conduct an inquiry. Jakeway assented.

During this time frame, Wilkins--who is African American--met with Anthony Whitmore, the Assistant Deputy Director of Minority Affairs for the ODOD, to discuss his concerns with the ODOD audit office and what he viewed as a cover-up of the short-comings of that office. At Whitmore's request, Kathy McNeal, the ODOD personnel director, met with Wilkins in July of 1992, and during this meeting Wilkins reiterated his concerns. McNeal arranged for a meeting between Wilkins and Jakeway.

Within a few days, Wilkins met with Jakeway's staff and other members of the ODOD's upper management. Wilkins told those at the meeting about the "gross misuse of federal funds" by the county

agencies and the failure of the audit department to detect that misuse. As a result of that meeting, the Ohio Inspector General contacted Wilkins and on July 28, 1992, Wilkins went to the Inspector General's office with his concerns. An investigation by the Inspector General followed.

On August 17, 1992, the Inspector General released a report that reviewed the past audits of the finances of the LACAC and noted numerous inefficiencies and errors in the auditing process. The report concluded: "Program Directors did not take appropriate action to insure that corrective action was taken by [the LACAC] to correct significant audit deficiencies identified in D.O.D. audits, beginning in 1987."

After months of continuing conflict with Garber--and to a lesser extent, Lombardi--during which time Wilkins received several written reprimands for, among other things, his confrontational approach and his failure to cooperate in the work of the ODOD, Wilkins was eventually fired on February 10, 1993. The defendants do not dispute that in most respects Wilkins's performance was acceptable. They contend, however, that his belligerent attitude, his refusal to accept direction from his supervisors, his repeated accusations of wrongdoing and his insistence on placing blame rather than working to find solutions for the problems made administration of the ODOD inordinately difficult. The instances to which Wilkins points as evidence of Garber's silencing him, the defendants contend, are in fact examples of Garber's attempting to keep order in the OCS and "move forward" in a positive direction. Garber claimed that the final straw came when she

learned that Wilkins had hired an employee from the ODOD audit office--of which Wilkins was so critical--who, as Wilkins knew, was seeking a promotion to a position with the Ohio Industrial Training Program, for which she would--and in fact, shortly after being hired, did--leave her employment with the OCS. The OCS was left with a vacancy that would take considerable time to fill. Garber stated that she then realized that Wilkins was never going to cooperate with the rest of the staff and that he was going to continue to disparage the audit office even though the audit office head had been fired as a result of the Inspector General's report.

At bottom, the defendants contend that Wilkins did not agree with Garber's view of what his job was and how he should perform it; neither did he agree with Garber's view of how the agency should be run. Garber and Lombardi decided in late January to approach Jakeway and recommend firing Wilkins, to which he agreed.

Wilkins brought this action on December 14, 1993, in the Southern District of Ohio, against Lombardi and Jakeway in both their individual and official capacities, and against Garber in her individual capacity. The complaint, as later amended, contains a 42 U.S.C. §§ 1983 claim for termination of employment in retaliation for his protected speech concerning the misuse of government money, in violation of the First and Fourteenth Amendments; a claim that Wilkins was terminated in violation of the state whistleblower statute; and a state law claim for intentional infliction of emotional distress.

The defendants filed a motion to dismiss on, *inter*

alia, qualified immunity grounds, which the district court denied with respect to the First Amendment retaliation claim and granted as to the pendent state law claims. The defendants brought an interlocutory appeal and this court affirmed the denial. *Wilkins*, 1996 U.S. App. LEXIS 5711, 1996 WL 84649, at *6.

On remand the district court granted the defendants' motion for summary judgment, finding that Wilkins's First Amendment claim was precluded by *Wilkins v. Jakeway*, 993 F. Supp. 635 (S.D. Ohio 1998), which dismissed Wilkins's separate False Claims Act action. Wilkins appealed and we affirmed the dismissal as to the official capacity claims but reversed and remanded on the individual capacity claims. *Wilkins*, 183 F.3d at 533. On remand the defendants filed a motion for summary judgment which the district court granted, holding that Wilkins's speech did not address a matter of public concern and therefore was not protected by the First Amendment. This timely appeal followed.

II.

Wilkins argues that the district court failed to adhere to the law of the case doctrine because this court had previously ruled that Wilkins's speech--asserting that the audit office had failed to take action to prevent the misuse of government money--addressed a matter of public concern. Similarly, Wilkins claims, the district court failed to follow this court's ruling that Wilkins's interest in speaking outweighed the ODOD's interest in an efficient workplace.

The law of the case doctrine provides that

"findings made at one point in the litigation become the law of the case for subsequent stages of that same litigation." *United States v. Moored,* 38 F.3d 1419, 1421 (6th Cir. 1994). The doctrine is similar to that of stare decisis, which is designed to ensure that similarly situated litigants receive similar treatment. The law of the case doctrine seeks to ensure that throughout their case, litigants are treated consistently. The law of the case doctrine is not a mandate but is instead subject to three "extraordinary" exceptions: (1) subsequent to the issuance of the prior decision, substantially different evidence is presented, or (2) a contrary view of the law is issued by a controlling authority; or (3) the prior decision is clearly erroneous or would create a manifest injustice if allowed to stand. *Craft v. United States,* 233 F.3d 358, 363-64 (6th Cir. 2000).

We do not find that the district court failed to follow the law of the case. Our earlier ruling affirmed the denial of the defendants' motion to dismiss; we ruled that as a matter of law, the allegations of Wilkins's *complaint* stated a claim for First Amendment retaliation. *Wilkins,* 1996 U.S. App. LEXIS 5711, 1996 WL 84649 at *3-*5. In granting the defendants' motion for summary judgment, the matter before us here, the district court held that the *evidence* introduced by Wilkins for purposes of summary judgment failed to raise a material issue of fact as to his retaliation claim and that the evidence did not support Wilkins's claim that his speech concerned matters of public interest. n1 These are two separate issues. *See Soc'y of Roman Catholic Church of the Diocese of Lafayette, Inc. v. Interstate Fire & Cas. Co.,* 126 F.3d 727, 735 (5th Cir. 1997) (noting that application of the law of the case doctrine is inappropriate when the relevant issues are governed by

different standards of review).

----------Footnotes----------

n1 Wilkins's argument that the district court failed to follow the law of the case with regard to the balancing of Wilkins's First Amendment interests against the state's interest in operating the ODOD efficiently is somewhat wide of the mark. Because the district court found that Wilkins's speech did not involve matters of public concern, it held that Wilkins's speech was not protected by the First Amendment, and the court therefore did not rest its opinion on the balancing issue.

----------End Footnotes----------

Furthermore, the two-interlocutory-appeal-rule announced in *Behrens v. Pelletier,* 516 U.S. 299, 513 U.S. 1142, 133 L. Ed. 2d 773, 116 S. Ct. 834 (1996), is inconsistent with Wilkins's broad reading of the law of the case doctrine. In *Behrens,* the Court's decision to allow interlocutory appeals (in the qualified immunity context) from denials of both a motion to dismiss and a motion for summary judgment rested in part on the ground that "the legally relevant factors bearing upon the *Harlow* question will be different on summary judgment than on an earlier motion to dismiss." *Id.* at 309. In the order before us in this appeal, the district court reviewed the evidence produced by the parties in support of and in opposition to the defendants' motion for summary judgment, whereas, in ruling on the motion to dismiss, the district court had only the contents of the pleadings to consider. This assignment of error is

without merit.

III.

We review the district court's grant of summary judgment de novo. *McCloud v. Testa,* 97 F.3d 1536, 1541 (6th Cir. 1996). We view the facts in the light most favorable to the nonmovant. *Jackson v. Leighton,* 168 F.3d 903, 909 (6th Cir. 1999). "Summary judgment is proper if the record shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Wolotsky v. Huhn,* 960 F.2d 1331, 1334 (6th Cir. 1992).

Qualified immunity protects from liability for civil damages those officials whose conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982). The purpose of qualified immunity, however, is not only to preclude an ultimate finding of liability. Instead, to advance the interests underlying qualified immunity--insuring that government officials are not deterred from efficiently and effectively performing their discretionary duties--qualified immunity is also a shield against the burdens and expenses of litigation itself. *Mitchell v. Forsyth,* 472 U.S. 511, 526, 86 L. Ed. 2d 411, 105 S. Ct. 2806 (1985). "The entitlement is an *immunity from suit* rather than a mere defense to liability." *Id.*

To avoid the bar of qualified immunity a plaintiff must show that his claimed right was clearly established at the time of the alleged violation such that a reasonable officer would have understood that his

conduct violated that right. Summarizing the law which governs the determination of whether a right was clearly established at the time of the alleged violation, we have said:

> The right must be defined at the appropriate level of specificity to determine whether it was clearly established at the time the defendants acted. This means that to be "clearly established" the contours of the right must be sufficiently clear so that a reasonable official would understand that what he is doing violates that right. A right is clearly established if there is binding precedent from the Supreme Court, the Sixth Circuit, the district court itself, or other circuits that is directly on point. "'This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.'"

Risbridger v. Connelly, 275 F.3d 565, 569 (2002) (internal citations omitted). And in *Cope v. Heltsley*, 128 F.3d 452, 458-59 (6th Cir. 1997) (citation omitted), we said that courts must:

> examine the asserted right at a relatively high level of specificity. The right must have been "clearly established" not just in an abstract sense, but in a "particularized" sense. Claims of immunity are thus to be analyzed "on a fact-specific, case-by-case basis to determine whether a reasonable official in the defendant's

> position could have believed that his conduct was lawful ...."

The unconstitutionality of an act must be "clear in regard to the official's particular actions in the particular situation." *Long v. Norris,* 929 F.2d 1111, 1114 (6th Cir. 1991), *abrogated on other grounds as recognized in Virgili v. Gilbert,* 272 F.3d 391, 395 (6th Cir. 2001).

Wilkins claims that he was discharged because he exercised his First Amendment right to free speech. There is no question that Wilkins had a right not to be discharged because of his speech if that speech was in fact protected by the First Amendment. The issue before us here is whether the speech that Wilkins claims was the reason for his discharge was thus protected, and if it was, whether a reasonable official at the time of Wilkins's discharge would have understood that the speech was protected by the First Amendment. We conclude that even if the district court erred in holding that Wilkins's speech was not protected, it was not clearly established at the time of Wilkins's discharge that the content of his speech was entitled to First Amendment protection.

To be protected by the First Amendment, Wilkins's speech was required to be related to "matters of public concern." *Pickering v. Bd. of Educ.,* 391 U.S. 563, 568, 20 L. Ed. 2d 811, 88 S. Ct. 1731 (1968). In 1993, however, there was no case law clearly establishing that speech such as Wilkins's was protected. The parties have pointed us to five cases prior to 1993 that discussed First Amendment retaliation claims. None of these cases would have put the

defendants on notice, in 1993, that their actions in discharging Wilkins violated his clearly established rights.

The first case in this circuit to directly discuss speech by a public employee concerning fraud and misuse of government funds was *Marohnic v. Walker,* 800 F.2d 613 (6th Cir. 1986). There we found that the plaintiff's assistance in a state investigation of his agency employer's involvement in medicaid fraud related to a matter of public concern and that the agency's retaliation against the plaintiff for his cooperation in the investigation violated the First Amendment. *Id.* at 616. We noted that the plaintiff's motivation for speaking was not personal but civic, and the speech was not in the context of an employment related dispute but a state investigation with which the plaintiff assisted. *Id.* We observed in that case the importance of the fact that the plaintiff's speech had neither hindered his job performance nor caused disruption in the workplace. *Id.*

In the second such case, *Solomon v. Royal Oak Township,* 842 F.2d 862, 865-66 (6th Cir. 1988), the plaintiff was a police officer who told a newspaper reporter that the head of the police department had not prosecuted an individual who had committed a crime--"an obstruction of justice"--and instead had hired that person for his own private investigative service--"for his own personal gain." The reporter published the story. We characterized these published statements as divulging "political corruption," and concluded that they related to matters of public concern and were protected by the First Amendment. And because we found that the statements did not cause conflict or disruption in the

department we concluded that in discharging the plaintiff because of his speech, the defendants had violated his First Amendment rights. *Id.* at 866.

In *Barnes v. McDowell,* 848 F.2d 725, 734-35 (6th Cir. 1988), we held that an employee's speech concerning the mismanagement of Kentucky's Bureau for the Blind did not charge that his employer was corrupt, and thus did not relate to a matter of public concern but was only about management incompetence.

This court in *Brown v. City of Trenton,* 867 F.2d 318, 322 (6th Cir. 1989), ruled that a letter by police officers to their superior voicing grievances over how a unit was run was not addressing a matter of public concern. We found that the plaintiffs' "grievances were essentially those of in-house people dissatisfied with the chief's leadership of their group" and not statements about the public interest motivated by the plaintiffs' public spirit. *Id.*

In the last case, *Thomson v. Scheid,* 977 F.2d 1017, 1019 (6th Cir. 1992), the plaintiff's job was to investigate fraud for his agency employer. The plaintiff investigated Scheid who complained to the plaintiff's superior. *Id.* We held that since the plaintiff's speech was made in the course of his job and concerned the procedures he was to follow, his speech was not on a matter of public concern. *Id.* at 1021.

Our review of the case law prior to Wilkins's termination reveals that the defendants could not reasonably have known that by firing Wilkins they were infringing on his constitutional right to free speech.

Looking at the "content, form, and context of a given statement, as revealed by the whole record" it is clear that Wilkins's speech did not address a matter of public concern as defined by the case law in 1993. *Connick v. Myers*, 461 U.S. 138, 147-48, 75 L. Ed. 2d 708, 103 S. Ct. 1684 (1983). Rather than charging corruption or fraud, most of Wilkins's speech assigned blame for the failures of the audit department and occurred during the performance of his job, where he was speaking as an employee and not as a citizen. Wilkins's speech arose in the context of a personal dispute with Garber over how Wilkins and the agencies within the ODOD were to perform their jobs. We hold that no reasonable official in the position of the defendants in 1993 would have understood that this speech was protected by the First Amendment.

We note as well that no reasonable state official sitting in the defendants' shoes in 1993 would have been able to determine that "the employee's interest in making such statements outweighs the 'interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'" *Bailey v. Floyd County Bd. of Educ.*, 106 F.3d 135, 144 (6th Cir. 1997). The record reveals no genuine dispute about the fact that Wilkins's speech was very disruptive to the working environment of the ODOD and greatly impeded the ability of the government, as employer, to fulfill its mission.

Accordingly, we find that the defendants are entitled to qualified immunity.

CONCLUSION

For the foregoing reasons, we **AFFIRM** the summary judgment in favor of the defendants.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

FILED
SEPTEMBER 29,2000

TERRY J. WILKINS,
Plaintiff,

v.

Case No. 2:93-CV-1159
JUDGE EDMUND A. SARGUS, JR.
Magistrate Judge Terence P. Kemp

DONALD E. JAKEWAY, et al.,
Defendants.

OPINION AND ORDER

This matter is before the Court for consideration of the Defendants' Motion for Summary Judgment (Doc. #61). For the reasons that follow, the Defendants' motion is granted.

I.

Plaintiff Terry J. Wilkins brings this action pursuant to 42 U.S.C. §1983 alleging that he was terminated from his

employment with the Ohio Department of Development ["ODOD"] in retaliation for the exercise of his right to free speech under the First and Fourteenth Amendments to the United States Constitution. The Defendants in this action are Donald E. Jakeway, former Director of ODOD; Vincent Lombardi, Assistant Director of ODOD; and Roberta Garber, former ODOD Deputy Director for the Community Development Division. The Court entertains this action pursuant to 28 U.S.C. §1331.

This Court is not the first to consider the circumstances surrounding the Plaintiff's termination from employment. The merits of Plaintiff's First Amendment claim are before this Court following the decision of the United States Court of Appeals for the Sixth Circuit, reversing an earlier decision in this case by the Honorable Joseph P. Kinneary. *Wilkins v. Jakeway*, 183 F.3d 528 (6th Cir. 1999). Judge Kinneary granted summary judgment to the Defendants herein on the basis that Plaintiff's First Amendment claim was precluded by the judgment in a separate action in which Plaintiff challenged his termination from employment under the "whistleblower" provisions of the False Claims Act, 31 U.S.C. §3730(h). *Wilkins ex. rel. United States v. Ohio*, C2-94-720 (Graham, J.). In that action, Plaintiff claimed that the Defendants perpetrated numerous false claims against the United States in the course of applying for and administering various federal grants. Judge Graham held, *inter alia*, that the Defendants could not be held liable under the False Claims Act because they were not "employers" for purposes of the Act[1]. The Sixth Circuit concluded that because Judge

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[1]Judge Graham ultimately granted summary judgment in favor of the Defendants on Plaintiff's "whistleblower" claim, in a later decision. Judge Graham concluded that it was Plaintiff's job to monitor the use of federal funds and to report

Graham's decision to dismiss the individually named Defendants did not reach the merits of Plaintiff's claim under the FCA, but rather, was a decision pertaining to the Court's subject matter jurisdiction, Plaintiff's First Amendment claim against the Defendants was not precluded by the judgment in the FCA case. *Wilkins v. Jakeway*, 183 F.3d at 533-34. Consequently, the Sixth Circuit allowed the First Amendment claim at bar to proceed. The merits of the claim against the Defendants in their individual capacities, are now ripe for this Court's review. Before assessing the claim under First Amendment principles, the Court will summarize the facts pertinent to its analysis.

Background

The Court observes at the outset that the parties have filed quite lengthy briefs, the vast majority of which are devoted to a recitation of various occurrences during Plaintiff's tenure at the ODOD. While this recitation is indeed helpful in understanding the intricacies of grant administration by ODOD and the various background events to this action, many of the facts exhaustively detailed are not relevant to the issues raised in the motion for summary judgment.

ODOD is a department of the state government and is charged under Ohio law with assisting local governments and

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any failure to comply with applicable regulations; thus, Judge Graham reasoned that, there was no evidence from which a reasonable jury could conclude that Plaintiff was acting outside the scope of his position and, consequently, failed to meet the statutory definition of a "whistleblower." *See Wilkins v. Jakeway*, 993 F.Supp. at 643.

community organizations with regard to economic development. ODOD is enabled with the power to apply for federal funding as a means of assisting various localities. *See* O.R.C. Chapter 122. ODOD is comprised of several divisions and offices, each with various responsibilities. One such division is the Community Development Division ["CDD"], which during the time relevant to Plaintiff's claim, was led by Defendant Garber. The Office of Community Services ["OCS"] is an office within CDD that is responsible for monitoring agencies receiving federal and state funds for the needy. Plaintiff was most recently employed as Chief of the OCS until he was terminated from employment in February 1993.

In his capacity as OCS chief, Plaintiff was responsible for monitoring the agencies that received Community Service Block Grants ["CSBG"] obtained through the United States Department of Health and Human Services. One of the major responsibilities of OCS is to designate community action agencies ["CAAs"] to receive the CSBG funds. During Plaintiff's tenure, the OCS also provided technical assistance to the CAAs and conducted yearly performance assessments of the CAAs. The results of the assessments were submitted to the Department of Health and Human Services. *See* R.C. §122.68.

The CAAs and other entities receiving funding through ODOD's divisions were audited by the ODOD Audit Office. Until January 1990, the audits consisted of a field inspection, followed by an office review of the CAA; such audits generally were conducted every two years. In January 1990, federal law required that CAAs obtain an annual audit by a private independent auditor, called a "single agency" audit, to review the entire operation of the CAA rather than simply its use of funds from a particular grant. *See* 31 U.S.C. §§7501, *et seq.* The ODOD Audit Office reviewed these single agency

audits but would not itself audit a CAA unless the single agency audit revealed a problem.

Beginning in 1990, Plaintiff voiced concern that the ODOD Audit Office was not acting to correct the alleged misuse of funds by certain CAAs. As described *infra*, Plaintiff voiced his concerns to officials within the OCS; at meetings with ODOD officials; and to the Ohio Inspector General. Plaintiff argues that all of the foregoing instances of "disclosure" on his part regarding the Audit Office amount to protected speech for First Amendment purposes.

From the record presented, it is evident that Plaintiff's concerns about the Audit Office were largely motivated by the results of a single agency audit of a particular CAA. In mid-1991, the audit of the Lima-Allen County Community Action Committee ["LACAC"] revealed that that CAA had an overall negative fund balance[2]. All state-administered funding to LACAC was eventually withdrawn and the LACAC was closed. Plaintiff claims that shortly before a meeting convened in July 1991 which included all state agencies which provided funds to LACAC, Defendant Garber instructed Plaintiff not to speak of deficiencies of the ODOD Audit Office in failing to discover the financial predicament of LACAC. Plaintiff claims that he feared retaliation by Defendant Gerber and thus, did not voice concern about Audit Office deficiencies at that time.

Plaintiff eventually played a role in the ODOD's close-down of the LACAC. In the course of these duties, Plaintiff directed memoranda to various individuals regarding the ODOD auditors' failure to discover the LACAC's use of

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[2]The LACAC had been passing funds to a separate corporation it formed in 1983 to buy and rehabilitate housing to rent or to sell to low-income families.

CSBG and other funds. In a memorandum to Assistant Attorney General Klodel, Plaintiff stated that the ODOD auditors failed to discover that funds obtained through ODOD were diverted to the Level One corporation established in the early 1980s. Plaintiff urged that the Attorney General recover the assets lost by LACAC's misuse of federal funds. Mr. Klodel rejected this request, however, finding it impossible to establish, as Plaintiff suggested, that the assets at issue were purchased with ODOD federal grant funds. Defendant Garber concurred with this conclusion.

Plaintiff continued to voice his concerns with respect to alleged deficiencies in the Audit Office's audits of CAAs. For example, Plaintiff expressed concern at CDD meetings as to why the Office's audits did not reveal the financial problems of CAAs, some of which were identified by the OCS[3]. In April 1992, a $200,000 negative cash balance at the Portage CAA was discovered. A meeting was convened at which Plaintiff and Defendant Garber were present. Plaintiff Wilkins contends that Defendant Garber again admonished him not to discuss shortcomings with the Audit Office's performance, which Plaintiff claims to have discovered. Plaintiff apparently criticized the Audit Office and voiced concern as to why the Office did not discover the overall financial problems of the Portage CAA. Defendant Garber allowed Plaintiff to speak but stifled his comments when she felt it was not productive to the meeting; Garber testified on deposition that she informed Plaintiff that his concerns would be more properly addressed at a meeting of the Audit Office

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[3]The Defendant contends Plaintiff's criticism reveals his lack of understanding as to the scope of the audits performed by the Audit Office; that is, the Office performed audits related to the particular grant monies at issue, rather than on the entire financial well-being of a CAA.

as it was apparently, in her view, no secret that timeliness of audits was a problem for the ODOD. One attendee at the Portage CAA meeting observed Plaintiff becoming loud, agitated, and upset in voicing his concerns. Nonetheless, Plaintiff claims that he was told not to complain about the Audit Office because Melanie Buller, the head of the office, could lose her job. Defendant Garber counseled Plaintiff about his behavior following the Portage CAA meeting.

In April 1992, Plaintiff received a somewhat negative performance evaluation, in comparison to evaluations in earlier years. The evaluation indicated that, although he worked effectively, his communication style was "less effective" as Plaintiff became "too intense" in speaking on matters that were important to him. This evaluation prompted Plaintiff to write a memo to Defendant Lombardi in July 1992. In the memo, Plaintiff explained what he knew about deficiencies in the Audit Office in failing to realize the financial condition of the LACAC[4] and the Portage CAA. The Defendant asserts that Plaintiff's memo was prompted by the fact of his poor evaluation, rather than out of concern for the LACAC audit results which had been revealed approximately one year earlier.

Plaintiff also initiated a meeting with Anthony Whitmore, Defendant Jakeway's Assistant Director of Minority Affairs, after receipt of the April 1992 performance evaluation. Plaintiff discussed the Audit Office's failure to

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[4]In particular, Plaintiff pointed out that the Audit Office failed to discover the financial condition of the LACAC despite the OCS' discovery of the Level One corporate entity in 1989; the Audit Office had concluded that Level One was simply an agency corporate account. Plaintiff argued in his memo to Lombardi that the Audit Office should have discovered that LACAC was funneling federal funds through Level One.

discover wrongdoing at the LACAC; Ms. Buller's failure to act; Defendant Garber's instructions to Plaintiff not to discuss deficiencies in the Audit Office; and Plaintiff's fear that Garber and Buller would retaliate against him. Mr. Whitmore relayed the conversation to Defendant Jakeway. Plaintiff also met separately with Kathy McNeal, ODOD human resource officer, about the alleged misuse of funds at LACAC and other CAAs. Plaintiff told Ms. McNeal that the Audit Office had been aware of the misuse of funds at LACAC for years. Plaintiff also informed McNeal of his fear of reprisal by Garber. Plaintiff asked McNeal to schedule a meeting with persons from Defendant Jakeway's office. Plaintiff met with several persons, including Whitmore and McNeal, in Jakeway's conference room. Plaintiff expressed his concerns about the misuse of funds by CAAs and his fear of being retaliated against for attempting to redress the situation. Plaintiff claims that an attendee of the meeting promised Plaintiff that Jakeway would protect him. Defendants Garber and Lombardi had no knowledge of this meeting until after Plaintiff was terminated from employment.

On July 6, 1992, Defendant Garber recommended to Defendant Jakeway that Plaintiff be terminated for what she perceived as inappropriate behavior. Defendant Garber met with Ms. McNeal about the matter. McNeal, however, did not support the recommendation to terminate Plaintiff.

Mr. David Sturtz, the Ohio Inspector General[5], began an investigation into the problems at LACAC following a

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[5]The Ohio Inspector General is a position created by statute, R.C. §121.42, designed to create an independent investigative agency authorized to review a variety of matters involving state government and agencies, including the misuse of government funds.

request by Defendant Jakeway. Jakeway recalls making the request for an investigation and meeting with Mr. Strutz in June 1992; OIG records indicate that Jakeway met with Mr. Strutz on July 27, 1992. Plaintiff spoke to staff members of the OIG on July 28, 1992. Plaintiff complained about the deficiencies of the Audit Office, Defendant Garber's instructions that he not speak, and his fear of disciplinary action. Plaintiff asserts that his comments at the meeting concerning his allegations that the Audit Office did not correct the misuse of funds by CAAs constitutes protected speech. At the Plaintiff's behest, Donald Skaggs, a subordinate in the OCS office, also met with OIG investigators. Mr. Skaggs informed the staff members that audits could have been more timely performed and that, in his view, Defendant Garber and Ms. Buller were responsible for the delay in addressing LACAC's problems.

About the same time as the foregoing events, Defendant Garber commenced an initiative into strategic planning for CAAs utilizing CSBG money. A series of four regional meetings were held to discuss the issue. Plaintiff and Skaggs were in attendance at the final regional meeting on July 22, 1992. Plaintiff apparently voiced some concern about his view of strategic planning at the meeting. Mr. Skaggs recalls that Plaintiff and Garber had differing views on the benefits of strategic planning.

Plaintiff and Mr. Skaggs apparently failed to participate in a CAA state-wide meeting in August 1992. As a result of Plaintiff's nonattendance, Defendant Garber consulted Defendants Lombardi and Jakeway. Defendant Garber then issued a written reprimand to Plaintiff for insubordination and neglect of duty on August 5, 1992. Plaintiff claims that upon receiving the reprimand, Defendant Lombardi informed him that he would be fired if he violated the chain of command of the department, *i.e.*, voicing

concerns to Jakeway, Whitmore and McNeal, rather than to Lombardi. Lombardi recalls mentioning the chain of command, but testified that the remark was made in the context of Plaintiff's voicing concern to Lombardi about opposition to strategic planning. As a result of the reprimand, Plaintiff had to prepare weekly itineraries of his work schedule for Garber's review.

On August 17, 1992, the OIG released its report on the investigation into LACAC. The report indicated that the Audit Office and program directors did not take appropriate action in regard to LACAC. Garber and Plaintiff were included in the persons cited for such failures. As a result of the report, Defendant Jakeway recommended that Ms. Garber, Plaintiff, and one Ms. Kerns-Dresser, be terminated. Mr. Jakeway and Mr. Lombardi conferred on the matter of disciplinary action, and several options were discussed, all of which were apparently more harsh for Plaintiff than for Ms. Garber. On September 8, 1992, Defendants Jakeway and Lombardi issued a memorandum to employees encouraging the reporting of misallocation of funds by grantees through a chain of command.

On October 6, 1992, Defendant Garber wrote a memo to Defendant Jakeway criticizing the OIG report and indicating that if Plaintiff were terminated as a result of the report he would very likely become a whistleblower.

On October 23, 1992, Defendant Jakeway issued a written reprimand to Plaintiff and to Garber. Plaintiff was reprimanded for meeting with OIG staffers outside the chain of command. The reprimand requested that Plaintiff prepare a response for action he planned to take to improve the oversight of CAAs. Wilkins prepared a response on November 23, 1992. Plaintiff indicated that the OCS did not have adequate financial audit capacity and that ODOD should

perform more audits of fund grantees. Plaintiff's memo also detailed his view of his job responsibilities, which apparently differed from the view of his supervisors.

On December 7, 1992, Defendant Garber sent a memo to McNeal requesting a hearing for a three day suspension for Plaintiff. The memo was prompted by Plaintiff's conduct at separate meetings. At one meeting, Plaintiff made a disparaging remark to a low-level female staff assistant. At other meetings, Plaintiff criticized the risk assessment of CAAs. Ms. Garber characterized Wilkins' behavior as belligerent and disruptive.

On January 29, 1993, Garber issued a written reprimand to Plaintiff. Plaintiff was reprimanded for failing to timely submit an assignment to her which gave her little time to review the same. Garber also reprimanded Plaintiff with respect to his preparation of a summary report for a meeting a meeting with the Council of Economic Opportunities of Greater Cleveland. The report identified the ODOD's perception of the possibility of a conflict of interest on the part of the council's chairperson. Defendant Garber had wished that the matter, involving an agency independent of ODOD, be addressed less formally than in a disseminated document. Upon seeing the report, however, the chairperson became quite agitated. Thus, Garber reprimanded Plaintiff for the incident. Plaintiff was also reprimanded for failing to monitor his staff and hiring a person who left the position shortly after being hired because she had, according to Garber, been actively seeking another ODOD position. Finally, Plaintiff was reprimanded for being tardy for a management training session. Plaintiff disputed each of the bases for his reprimand.

After issuing the January 29, 1993 reprimand, Defendant Garber decided to recommend that Plaintiff be

terminated. She discussed the matter with Defendant Lombardi. Both Garber and Lombardi perceived a pattern of troublesome behavior on Plaintiff's part. Lombardi agreed with the decision and consulted with Jakeway on February 3, 1993. Jakeway approved the termination based upon the recommendation of Garber and Lombardi. Jakeway continued to subjectively believe that Plaintiff's termination was justified by the OIG report. McNeal opposed termination for what she viewed as merely insubordination on Plaintiff's part[6]. Jakeway issued a termination letter for Plaintiff on February 10, 1993.

II.

With the foregoing factual background in mind, the Court will proceed to consider the merits of Defendants' dispositive motion. The procedure for considering whether summary judgment is appropriate, is found in Fed. R. Civ. P. 56(c); this section provides:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material

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[6]McNeal apparently prepared a memorandum for Garber on February 4, 1993 identifying reasons why Plaintiff's termination may be perceived as motivated by Plaintiff's race, which is African-American. McNeal purportedly sent copies of the memorandum to Lombardi and Jakeway. McNeal claims that Lombardi destroyed the memorandum in her presence; Jakeway denies having seen the memorandum. The Court finds this evidence irrelevant to the issue at bar; *i.e.* whether Plaintiff engaged in conduct protected by the First Amendment.

fact and that the moving party is entitled to judgment as a matter of law.

The evidence must be viewed in the light most favorable to the nonmoving party. *Adickes v. Kress & Co.*, 398 U.S. 144, 158-59 (1970). Summary judgment will not lie if the dispute about a material fact is genuine; "that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Summary judgment is appropriate however, if the opposing party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *see also, Matsushita Electronic Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

The United States Court of Appeals for the Sixth Circuit has recognized that *Liberty Lobby, Celotex,* and *Matsushita* have effected "a decided change in summary judgment practice," ushering in a "new era" in summary judgments. *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1476 (6th Cir. 1989). The court in *Street* identifies a number of important principles in new era summary judgment practice. For example, complex cases and cases involving state of mind issues are not necessarily inappropriate for summary judgment. *Id.* at 1479.

In addition, in responding to a summary judgment motion, the nonmoving party "cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must 'present affirmative evidence in order to defeat a properly supported motion for summary judgment.'" *Id.* (quoting *Liberty Lobby*, 477 U.S. at 257). The nonmoving party must adduce more than a mere scintilla of evidence in

order to overcome the summary judgment motion. *Id.* It is not sufficient for the nonmoving party to merely "'show that there is some metaphysical doubt as to the material facts.'" *Id.* (quoting *Matsushita*, 475 U.S. at 586). Moreover, "[t]he trial court no longer has the duty to search the entire record to establish that it is bereft of a genuine issue of material fact." *Id.* That is, the nonmoving party has an affirmative duty to direct the Court's attention to those specific portions of the record upon which it seeks to rely to create a genuine issue of material fact.

III.

A. Applicability of Issue Preclusion

In moving for summary judgment, the Defendants first assert that many of the facts pertinent to this Court's analysis of Plaintiff's First Amendment claim are established by means of issue preclusion in light of Judge Graham's decision and the decision of the Ohio State Personnel Board of Review ["SPBR"]. Plaintiff argues that the doctrine of issue preclusion is inapplicable to the matter at bar.

The Defendants argue that this Court must observe the SPBR's finding that Plaintiff served as an unclassified civil servant, *i.e.*, an employee at-will. Defendants also argue that this Court must observe Judge Graham's conclusion that there is no evidence to indicate that the "inadequacies in the monitoring and accounting systems used by ODOD resulted in the loss of federal funds" (C2-94-720, slip op.at 25), and that there is no evidence to "establish any nexus between untimely audits and the failure to recover improperly spent CSBG funds." (*Id.* at 26). Judge Graham also observed that Ohio had no legal duty to return "misspent" CSBG funds to the federal government. (*Id.* at 35-38). Judge Graham found that Plaintiff's speech, for purposes of his FCA claim, consisted of questioning the supervision of CAAs,

complaining that ODOD grant audits did not more closely resemble the single agency audits eventually performed. (*Id.* at 57-63). Judge Graham further concluded that as to the allegations of "misuse of funds," "[t]here is no evidence from which a jury could reasonably find that defendants should have known that Plaintiff was doing anything outside the scope of his job." (*Id.* at 78-79).

Pursuant to 28 U.S.C. §1738, state court judgments are to be given both issue and claim preclusive effect in subsequent actions pursuant to 42 U.S.C. §1983. *Univ. of Tennessee v. Elliot*, 478 U.S. 788, 796 (1986). In *Elliot*, the United States Supreme Court further held that principles of issue preclusion also apply to "the factfinding of [state] administrative bodies acting in a judicial capacity . . . ." *Id.* The Court reasoned that, when an administrative agency acts in a judicial capacity to resolve issues of fact which the parties before it have had an adequate opportunity to litigate, application of *res judicata* principles is appropriate. Consequently, federal courts are to afford factfinding decisions of state administrative agencies the same preclusive effect to which the decision would be entitled in state courts.

Collateral estoppel, or issue preclusion, prevents the relitigation between the same parties, or those in privity, of legal or factual issues that have been actually litigated and necessary to the determination of a prior case, even though the subsequent action is based upon a different cause of action. *Johnson's Island, Inc. v. Bd. of Twp. Trustees*, 69 Ohio St.2d 241 (1982). In Ohio, whether a factual finding of a state administrative agency is given preclusive effect in a subsequent action in state court, depends upon whether "the identical issue was actually litigated, directly determined, and essential to the judgment in the prior action." *Lupo v. Voinovich*, 858 F.Supp. 699, 703 (S.D. Ohio 1994), quoting *Cooper v. City of North Olmstead*, 795 F.2d 1265, 1268 (6th

Cir. 1986). This inquiry is fact-sensitive and requires the Court to closely examine the administrative proceeding at issue.

In this case, the SPBR, in considering the circumstances of Plaintiff's termination, concluded that Plaintiff served as an unclassified civil servant at ODOD. The parties at bar do not contend that their opportunity to litigate this issue was limited in any way. Nonetheless, this Court concludes that whether Plaintiff was a classified or unclassified civil servant is irrelevant to Plaintiff's First Amendment claim. Therefore, the Court finds that issue preclusion on this factual finding is immaterial.

Defendants also invoke the doctrine of collateral estoppel in regard to the factual findings made by Judge Graham, indicated *supra*. This Court concludes that Judge Graham's findings were actually litigated and determined and, further, were essential to the judgment rendered on Plaintiff's claim under the False Claims Act. Nonetheless, this Court finds it appropriate to base the decision herein on its own review of the record as presented in this case, in that the First Amendment claims involved in this action raise issues not before Judge Graham and not addressed in the prior case.

B. First Amendment Claim

1. Standard of Review

The First Amendment's protection of free speech extends to speech by a public employee when the employee speaks as a citizen on matters of public concern. The First Amendment does not, however, protect an employee's speech made solely in the course of his or her public employment. *Connick v. Myers*, 461 U.S. 138, 147 (1983). In order for Plaintiff to establish a claim under 42 U.S.C. §1983 for

discharge from public employment because of the exercise of constitutionally protected speech, Plaintiff must prove the following three elements: First, that the speech is constitutionally protected, that is, the statements addressed a matter of public concern; second, that the employee's interest as a citizen in his speech is not outweighed by the government employer's interest in the efficiency of its office; and, third, that the protected speech was a substantial and motivating factor in the adverse employment action. *Barnes v. McDowell*, 848 F.2d 725, 732-33 (6th Cir. 1988), *cert. denied*, 488 U.S. 1007 (1989).

With respect to the first element of a claim, whether the speech at issue is a matter of public concern, is a question of law. *Id.* at 133. If the Plaintiff establishes that his speech addressed a matter of public concern, the state then bears the burden of demonstrating that it terminated Plaintiff for legitimate purposes. *Rankin*, 107 S. Ct. at 2898. Before the burden shifts to the state, however, the Court must consider the second element of the Plaintiff's claim; that is, the Court must weigh the value of the speech against its impact upon the efficiency, discipline and proper administration of the government employer. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 569-70 (1968). This analysis is part of the "ultimate issue [of law] -- whether the speech is protected." *Rankin*, 107 S. Ct. at 2897, n.9.

In considering whether the Plaintiff's speech is on a matter of public concern, the Court is to examine the content, form and context of the speech as revealed by the whole record. *Connick*, 461 U.S. at 147-48. In general, a matter of public concern is a "matter of political, social, or other concern to the community." *Id.* at 146. There is an important distinction, however, between matters of public concern and matters of internal office politics. The Sixth Circuit has specifically held that "[t]he mere fact that public monies and

government efficiency are related to the subject of a public employee's speech do not, by themselves, qualify that speech as being addressed to a matter of public concern." *Barnes v. McDowell*, 848 F.2d at 734. The Sixth Circuit acknowledges, however, that:

> [I]t is possible to view allegations that public monies are being spent unwisely and that a government program is being run inefficiently, as implying that a public agency or official is corrupt . . . . "[S]peech disclosing public corruption is a matter of public interest and therefore deserves constitutional protection."

Id. at 734, quoting *Solomon v. Royal Oak Township*, 842 F.2d 862, 865 (6th Cir. 1988). When faced with a motion for summary judgment, the Plaintiff must present concrete evidence in support of the implication of public corruption in order to survive the motion. *Id.*

In *Thomson v. Scheid*, 977 F.2d 1017 (6th Cir. 1992), plaintiff, a fraud investigator for the Erie County Department of Human Services, discovered in the course of his duties that a county commissioner failed to disclose certain income to the Department for his elderly aunt, for whom the commissioner held a power of attorney. Plaintiff's supervisors approved his making of complaints to the FBI and the OIG. They told him, however, that the information relevant to the complaints was confidential and that he was to follow internal department procedures in initiating an investigation. All of this occurred within the duties of his position as an investigator. Whatever other job protection the plaintiff may have had, he was not acting as a citizen speaking out on a matter of public concern, and was not protected by the First Amendment. In reaching this conclusion, the Court relied on the evidence that the

Plaintiff's contact with investigators had been approved by his supervisors, and thus, Plaintiff acted in the course of his duties.

In *Johnson v. Univ. of Cincinnati*, 215 F.3d 561 (6th Cir. 2000), a university professor claimed that he was terminated on account of his speech regarding the university's failure to comply with policies on affirmative action. The Court concluded that this speech constituted a matter of public concern because it pertained to a politically charged issue -- affirmative action. The Court further concluded that the Plaintiff's speech was not outweighed by the government employer's interest in the efficient operation of the university. The Court reasoned that even if the Plaintiff's speech delayed the university's hiring of prospective employees, the speech had the effect of promoting or advancing the university's goal of employment equality. Thus, the restriction on Plaintiff's speech was not justified.

Although the Sixth Circuit concluded in *Johnson* that the government's interest did not outweigh the plaintiff's interest in free speech, the Supreme Court has held that there may be instances when even though the speech touches on a matter of public concern, termination is justified. This occurs when the "legitimate countervailing government interests are sufficiently strong." *Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668, 675 (1996). The government need not allow "events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action." *Connick*, 461 U.S. at 151-52. Thus, as indicated *supra*, the Court is to consider the first two elements of a claim under the First Amendment as bearing upon the ultimate issue of law, *i.e.*, whether the speech at issue involves a matter of public concern.

2. Application

With these principles in mind, the Court proceeds to determine whether Plaintiff Wilkins spoke about matters of public concern. In considering the content, form, and context of the matters on which Plaintiff Wilkins spoke, this Court concludes that Wilkins' speech did not involve matters of public concern. The record reveals that Plaintiff voiced his concerns about deficiencies in the Audit Office to persons within the CDD, to ODOD officials and to the OIG. Plaintiff's speech consisted of his concern that audits were not performed in a timely fashion, that the audits were inaccurate and inadequate because the Audit Office failed to consider certain costs that had been questioned and documented by the OCS, and that the Audit Office failed to consider allegations of possible misuse of federal funds by the CAAs.

As the Sixth Circuit has held, the mere fact that a government employee speaks on matters involving public money and government efficiency, does not, by itself, constitute a matter of public concern. *Barnes v. McDowell, supra.* Rather, the content, form and context of the speech must implicate some matter of political, social or other concern to the community. In viewing the record at bar, this Court concludes that the content, context and form of Plaintiff's speech fails to rise to this level. While Plaintiff was indeed correct that certain CAAs were misusing federal funds, the record does not indicate that the same was necessarily related to the deficiencies in the Audit Office. The record clearly reflects that the Audit Office failed to perform its functions in a timely manner and that it acted deficiently. The record also reflects, however, that Plaintiff, whose duty included oversight of agencies receiving federal funds, also was deficient in the performance of his duty.

Clearly, when a Plaintiff's speech consists of allegations that public money is being spent unwisely and that a government program is being run ineffectively, which "impl[ies] that a public agency or official is corrupt . . . [such speech] is a matter of public interest and therefore deserves constitutional protection." *Barnes v. McDowell*, 848 F.2d 725, 734 (6th Cir. 1988), citing *Solomon v. Royal Oak Township*, 842 F.2d 862, 865 (6th Cir. 1988). In the case at bar, however, the speech in which Plaintiff engaged did not imply that the Audit Office or any other public agency was corrupt. Rather, Plaintiff's speech simply alleged that the Office was deficient and ineffective. Such allegations do not imply corruption and were within the duties of Plaintiff's position. In the Court's view, Plaintiff's speech does not concern a matter warranting First Amendment protection.

The Court observes that record at bar is distinguishable from cases in which speech has been found to involve matters of public concern. For example, in *Johnson v. Univ. of Cincinnati*, 215 F.3d 561 (6th Cir. 2000), the Plaintiff spoke about the university's failure to comply with its affirmative action policy in hiring. Affirmative action is clearly a matter of important social concern. In contrast, the failure of the Audit Office to perform timely or more thorough audits that may have led to the discovery of misspent grant money is not of the same social import. In *Warnock v. Pecos Co., Texas*, 116 F.3d 776 (5th Cir. 1997), relied upon by the Plaintiff herein, the court held that the reporting of misconduct by county officials was a matter of public concern. In *Campbell v. Arkansas Dept. of Correction*, 155 F.3d 950 (8th Cir. 1998), also relied upon by the Plaintiff, the court held that a prison warden's report of security breaches by the prison was a matter of public concern. Again, this Court finds the records in these cases to reveal matters of much greater social import than the record in the case at bar.

Moreover, even if this Court were to conclude that the Plaintiff's speech pertained to a matter of public concern, this Court finds that the legitimate interests of the ODOD in maintaining an effective and efficient organization are sufficiently strong so as to outweigh any interest Plaintiff has in speaking out about the deficiencies of the Audit Office. The record at bar clearly establishes that Plaintiff had a history of speaking about Audit Office deficiencies, as well as criticizing his own supervisors in public meetings, at inappropriate places and times. Plaintiff received negative disciplinary reports as a result and was counseled by Defendant Garber on his communication style. Defendant Garber testified that she informed Plaintiff, on at least one occasion, that his concerns would be better addressed at an Audit Office meeting. Furthermore, the record reveals that Plaintiff had a history of disagreeing with his supervisors as to the appropriate supervisory role the ODOD should play over CAAs. Finally, the record demonstrates that Plaintiff voiced his complaints to the Ohio Inspector General's office. Plaintiff and other employees were ultimately cited by the OIG for deficiencies in their supervision of public funds. The record reveals that Plaintiff was not, however, discharged following the OIG report.

In sum, the Court finds that the ODOD's legitimate interest in maintaining an effective and efficient working environment was sufficiently strong to outweigh any interest the Plaintiff had in speaking about the failures of the Audit Office. Moreover, the Court concludes that Plaintiff's speech did not relate to a matter of public concern and, thus, does not warrant First Amendment protection. The Defendants' motion for summary judgment is meritorious.

IV.

In light of the foregoing, the Defendants' Motion for Summary Judgment (**Doc. #61**) is **GRANTED.** This action is hereby **DISMISSED.** The Clerk is **DIRECTED** to enter Judgment accordingly.

IT IS SO ORDERED.

DATE	**EDMUND A. SARGUS, JR.**
	UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
OCT 7 2002

Terry Wilkins,

Plaintiff-Appellant,

v.

Donald Jakeway, Vincent Lombardi, and Roberta Garber

Defendants-Appellees.

ORDER

BEFORE: GUY AND BATCHELDER, Circuit Judges; and WALTER; District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court

having requested a vote on the suggestion for rehearing en banc, the petition fo rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

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Leonard Green, Clerk

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*Hon. Donald E. Walter, Senior United States District Judge for the Western District of Louisiana, sitting by designation.